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MCAT GEN SDN BHD

v.

CELCOM (M) BHD (NO 2)

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HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: S6-23-74-2005]
20 MAY 2007

C ***CIVIL PROCEDURE:*** *Stay of Proceedings - Discretion of court - Stay of proceedings will not be granted simply because of an appeal to Court of Appeal - Whether continuance of proceedings would work an injustice - Whether oppressive or vexatious or abuse of process of court - Court to exercise its discretion whenever just and reasonable to do so*

D ***CIVIL PROCEDURE:*** *Stay of Proceedings - Burden of proof - Applicant to show special circumstance - Whether appeal would be rendered nugatory if stay not granted*

CIVIL PROCEDURE: *Stay of Proceedings - Application - Delay -* E *Inordinate and contumelious delay in filing stay application - Whether fatal*

On 11 December 2006 this court ordered High Court Civil Suit No: S4-22-23-77-2005 ("S4 suit") be transferred to this court and heard after the adjudication of the present proceedings ("S6 suit"). Aggrieved by that decision, the plaintiff filed an appeal to the Court of Appeal F against that decision. The plaintiff now filed an application in encl. 35 seeking a stay until the full and final determination of the plaintiff's appeal to the Court of Appeal. The plaintiff too sought for a stay to enable the trial and final determination of the Kuala Lumpur High Court Civil Suit No: D4-22-1682-2005 ("D4 suit") involving the same parties G as in the S6 suit. The plaintiff's stay application was filed approximately 1 year 2 months and 6 days after the filing of the D4 suit, the S4 suit and the S6 suit. And the plaintiff's stay application was also filed approximately 1 year 20 days after the filing of the defence to the D4 suit and the filing of the defence and counterclaim to the S6 suit and H approximately 1 year 13 days after the filing of the defence and counterclaim to the S4 suit.

Held (dismissing the stay application without costs):

(1) A stay of proceedings will not be granted simply because there is I an appeal to the Court of Appeal. No prejudice would have been occasioned to the plaintiff or to the individual directors of the plaintiff if the court were to hear the S4 suit. The plaintiff had also

failed to show how the continuance of the proceedings would work an injustice in that it would be oppressive or vexatious to the plaintiff or that it would be an abuse of the process of the court. The burden to prove all these lay squarely with the plaintiff. The plaintiff's stay application was simply a tactical ploy to delay the determination of the S6 suit and, consequently, the S4 suit. (para 6)

(2) The law relating to the granting of a stay of proceedings is settled. The court must exercise its discretion as to what is the fairest mode, after taking into consideration all the relevant matters, which exist between the parties. The court may exercise its discretion whenever it is just and reasonable to do so, so as to ensure that justice is done to both the parties. (para 7)

(3) The plaintiff had failed to disclose a single fact or issue that would amount to a special circumstance. The plaintiff failed to identify a single ground in its affidavits to show to that the plaintiff's appeal to the Court of Appeal would be rendered nugatory in the event a stay of the proceedings was not granted. (paras 11 & 14)

(4) There was inordinate and contumelious delay in filing the stay application. That delay was fatal. The plaintiff should have filed encl. 35 promptly and should not have slept on its rights. No explanation was forthcoming for the delay. (para 19)

Case(s) referred to:

All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Hold Under Grant No. 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 HC ***(refd)***

Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman, Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman & Ors [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Baring Futures (Singapore) Pte Ltd (in liquidation) v. Deloitte & Touche (a firm) & Anor [1997] 3 SLR 312 ***(refd)***

Board of Governors of Sekolah Menengah St Gabriel v. Ranjit Singh [1970] 1 MLJ 38 ***(refd)***

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 ***(refd)***

Chase Perdana Bhd v. Md Afendi Hamdan [2006] 5 CLJ 563 HC ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***

Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***

Hj Wan Habib Syed Mohamed v. Datuk Patinggi Hj Abdul Taib Mahmud & Anor [1986] 2 CLJ 115; [1986] CLJ (Rep) 149 SC ***(refd)***

New Zealand Society Of Physiotherapists v. Accident Compensation Corporation [1988] 1 NZLR 157 ***(refd)***

A *Serangoon Garden Estate Ltd v. Ang Keng [1953] 1 LNS 98 HC* ***(refd)***
Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd [2005] 7 CLJ 385 HC ***(refd)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***
Yamamori (Hong Kong) Ltd v. Davidson [1992] 2 MLJ 410 ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, s. 73
Interpretation Acts 1948 and 1967, s. 108
Rules of the Court of Appeal 1994, s. 13
Rules of the High Court 1980, O. 4 rr. 1(1)(a), (b), (c)

C **Other source(s) referred to:**
Halsbury's Laws of England, 4th edn, reissue, vol 37, p 290, para 926

For the plaintiff - Christie Soosay Nathan (Dato' Muzaffirah Tun Dato' Seri Ahmad Fairuz with him); M/s Christie Soosay Nathan & Assoc
D *For the defendant - Shahul Hameed Amirudin (Sunil Abraham with him); M/s Zul Rafique & Partners*

Reported by Amutha Suppayah

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JUDGMENT

Abdul Malik Ishak J:

Introduction

F **[1]** I gave an order on 11 December 2006 that the High Court Civil Suit No: S4-22-23-77-2005 ("S4 suit") be transferred to this court and heard after the adjudication of the present proceedings *vide* the High Court Civil Suit No: S6-23-74-2005 ("S6 suit"). Aggrieved by that decision, the plaintiff has since filed an appeal to the Court of Appeal. I G have since written a judgment and it has not been reported and for convenience it shall be referred to as the "first judgment".

[2] The plaintiff now filed an application in encl. 35 seeking a stay until the full and final determination of the plaintiff's appeal to the Court H of Appeal against my decision as reflected in the first judgment. The plaintiff too sought for a stay to enable the trial and final determination of the Kuala Lumpur High Court Civil Suit No: D4-22-1682-2005 ("D4 suit") involving the same parties as in the S6 suit. Whereas the plaintiffs in the S4 suit were the directors of the present plaintiff while the I defendant is the present defendant.

To The Heart Of The Matter

[3] The plank of the plaintiff's arguments may be stated in this way. That the stay must be granted to enable the trial and final determination of the D4 suit. That, according to the plaintiff, constituted the special circumstance that this court ought to consider and accept. It was also submitted at the bar that the D4 suit has been scheduled for hearing on the following dates. On 13 June 2007 and on 14 June 2007. Again, on 30 July 2007 and on 31 July 2007. Finally, on 1 August 2007 and on 2 August 2007. But, unfortunately, the plaintiff's affidavits did not reflect nor show the hearing dates scheduled by the D4 court as alleged.

[4] An affidavit plays a vital role in an interlocutory application. The affidavit usually sets out the facts on which the party relies upon *(Yamamori (Hong Kong) Ltd v. Davidson* [1992] 2 MLJ 410, 420). It was, unfortunately, not the case here. Nothing was mentioned in the affidavits about the hearing dates of the D4 suit. What was told to me was entirely done at the bar.

[5] Even if it was true that the hearing dates have been set by the learned judge of the D4 suit as stated by the plaintiff, that cannot be the reason to stay the present proceedings. With respect, the trial of the D4 suit may proceed as scheduled without affecting the progress of the present proceedings.

[6] As matter of law, a stay of proceedings will not be granted simply because there is an appeal to the Court of Appeal. No prejudice has been occasioned to the plaintiff or to the individual directors of the plaintiff if this court were to hear the S4 suit. The plaintiff has also failed to show how the continuance of the present proceedings would work an injustice in that it would be oppressive or vexatious to the plaintiff or that it would be an abuse of the process of the court - and the burden to prove all these lies squarely with the plaintiff. The plaintiff's stay application is simply a tactical ploy to delay the determination of the S6 suit and, consequently, the S4 suit.

[7] The law relating to the granting of a stay of proceedings is settled. The court must exercise its discretion as to what is the fairest mode, after taking into consideration all the relevant matters, which exist between the parties. Put differently, the court may exercise its discretion whenever it is just and reasonable to do so, so as to ensure that justice is done to both the parties. It is entirely an exercise of discretion, pure and simple. These principles of law are reflected in *Halsbury's Laws of England*, 4th edn, reissue, vol. 37 at p. 290 at para. 926:

> In general a stay of proceedings arises under an order of the court which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process. The order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.

[8] It is also reflected in *Board of Governors of Sekolah Menengah St. Gabriel v. Ranjit Singh* [1970] 1 MLJ 38 where Raja Azlan Shah J (as HRH then was) aptly said at p. 39 of the report:

> I hold the view that a stay of proceedings is a matter of discretion and the court must exercise its discretion as to what is the fairest mode, upon taking all matters into consideration of trying the several disputes which exist between the parties. In one case one consideration may have more sway, more cogency, and more effect than that same consideration, perhaps, may have in another. Putting it in another way, the court must exercise its discretion whenever it is just and reasonable to do so.

[9] And Zakaria Yatim J, in *Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman, Bank Bumiputra Malaysia Berhad & Anor. v. Lorrain Esme Osman & Ors* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472, said the same thing in these salient words:

> The law on this point has developed in England over the years. I shall start with the case of *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382. In that case the Court decided that a mere balance of convenience was not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court. The Court laid down two requirements to be satisfied in order to justify a stay. Firstly, the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court. Secondly, the stay must not cause injustice to the plaintiff. The burden of proving both requirements was on the defendant.

[10] Even if the merits of the appeal were to be considered as was considered by Brown J., in *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] 19 MLJ 116, the plaintiff's appeal to the Court of Appeal, so submitted the defendant, has no good prospects of success. It was a case of transferring the S4 suit to the S6 court and the S4 suit to be

heard after the S6 suit has been heard. It was as simple as that. It looks like the D4 suit would be heard next month (June 2007) as was said by the plaintiff. And if that is really true, then the trial of the S6 suit would surely be heard after the D4 suit. No one knows the outcome of the trial of the D4 suit. It is to be heard by another judge. It is because of the "potential disaster of inconsistent verdicts" (to borrow the words of Lai Kew Chai J, in *Baring Futures (Singapore) Pte Ltd (in liquidation) v. Deloitte & Touche (a firm) & Anor* [1997] 3 SLR 312) or the fear of "two inconsistent judgments" (to borrow the words of Raja Azlan Shah CJ (Malaya) (as HRH then was) in *Central Securities (Holdings) Bhd. v. Haron Bin Mohamed Zaid* [1979] 2 MLJ 244, 251) that I made those orders as I did in the first judgment. I wonder why the defendant in the D4 suit did not apply to transfer the D4 suit to this court! It would certainly save time and costs.

[11] At the outset, I must categorically say that the plaintiff has failed to disclose a single fact or issue that would amount to a special circumstance. In fact, the plaintiff's affidavits failed to make any reference to the existence of any special circumstances. The plaintiff's application for a stay was premised on two considerations, namely:

(a) pending an appeal to the Court of Appeal against my decision; and

(b) pending the full and final determination of the trial of the D4 suit.

With respect, these two considerations cannot constitute special circumstances unless the plaintiff can show that my decision dated 11 December 2006 as reflected in the first judgment had caused an injustice in that it was oppressive or vexatious to the plaintiff or that it would amount to an abuse of the process of the court. Additionally, the plaintiff must establish that the stay of the present proceedings would not cause an injustice to the defendant (*Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman, Bank Bumiputra Malaysia Berhad & Anor v. Lorrain Esme Osman & Ors (supra)*).

[12] I have said many times before that an appeal to the Court of Appeal cannot automatically operate as a ground to stay any proceedings. Section 73 of the Courts of Judicature Act 1964 expressly provides that:

> 73. Appeal not to operate as stay of execution.
>
> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Section 13 of the Rules of the Court of Appeal 1994 also provides that:

> 13. Stay of proceedings on appeal.
>
> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The same sentiments have been expressed in the following cases:

(a) *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC;

(b) *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 HC;

(c) *All Persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Hold Under Grant No. 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn Bhd* [1998] 5 CLJ 49;

(d) *Walter a/l Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd* [2005] 7 CLJ 385; and

(e) *Chase Perdana Bhd v. Md Afendi bin Hamdan* [2006] 5 CLJ 563 HC.

[13] Reverting back to the merits of the appeal, I must categorically say that the order which I gave on 11 December 2006 cannot be faulted for the following reasons:

(a) there is similarity in the subject matter between both the two suits – referring to the S6 suit and the S4 suit;

(b) if the S4 suit was not transferred to this court and heard after the disposal of the S6 suit, there is a possibility of conflicting decisions being arrived at based on the same set of facts;

(c) it is to enable a just, efficient and uniform determination of the similar issues existing in these two suits;

(d) there would be a substantial savings of time and costs when both the suits are heard by the same judge;

(e) the solicitors for the litigants in both the two suits - referring to the S6 suit and the S4 suit, are the same;

(f) the reliefs sought by the plaintiff in the S6 suit and by the plaintiffs in the S4 suit arose out of the same action; and

(g) the provisions of O. 4 r. 1(1)(a), (b) and (c) of the Rules of the High Court 1980 ("RHC") have been satisfied.

[14] No prejudice has been suffered by the plaintiff and the individual directors of the plaintiff in having this court determine both the S6 suit and the S4 suit. The plaintiff has failed to identify a single ground in its affidavits to show to this court that the plaintiff's appeal to the Court of Appeal would be rendered nugatory in the event a stay of the proceedings was not granted. The plaintiff too has failed to show in its affidavits as to how the continuance of both the two suits - referring to the S6 suit and the S4 suit, in this court would work an injustice and be oppressive or vexatious to the plaintiff and would also be an abuse of the process of the court. Bereft of all these materials in the plaintiff's affidavits, I must conclude that there were no grounds advanced by the plaintiff in support of its application for a stay.

The Stay Pending The Determination Of The D4 Suit

[15] I am constrained to say that this cannot constitute a special circumstance warranting a stay. A recital of the facts would be appropriate at this juncture. On 12 October 2005 and on 13 October 2005, the plaintiff took out advertisements in Utusan Malaysia, the Star and the New Straits Times with regard to the launching of a new pre-paid package associating the name and brand of the defendant. On 13 October 2005, the chief executive officer of the plaintiff by the name of Mohd Razi bin Adam (the fifth plaintiff in the S4 suit) issued a letter on behalf of the plaintiff and addressed to the defendant wherein he apologised to the defendant for the unauthorised advertisements and promotions of the product in association with the defendant. For this very reason, the stand of the defendant was that there was no basis to file the S6 suit and, consequently, this prompted the defendant to file an application to strike out the S6 suit as reflected in encl. 6 and that application is currently pending appeal to the judge in chambers. The defendant held the view that there was no necessity, in so far as the S6 suit was concerned, to proceed for trial. And to allow the plaintiff's application for a stay would prevent the disposal of the S6 suit on an interlocutory basis.

[16] No special circumstances were set out by the plaintiff in its affidavits to warrant a stay of the proceedings pending the determination of the D4 suit. There was nothing on record to justify the stay of the present proceedings pending the disposal of the D4 suit.

A **An Inordinate Delay**

[17] The chronology of events would show that there was indeed a delay in filing the stay application. I shall now set out the chronology of events:

B (a) on 23 November 2005, the plaintiff filed the D4 suit;

(b) on 23 November 2005, the plaintiff also filed the S4 suit;

(c) on 23 November 2005, the plaintiff likewise filed the S6 suit;

C (d) on 9 January 2006, the defendant filed the defence to the D4 suit;

(e) on 9 January 2006, the defendant filed the defence and counterclaim to the S6 suit;

(f) on 16 January 2006, the defendant filed its statement of defence and
D counterclaim to the S4 suit; and

(g) on 29 January 2007, the plaintiff filed the present stay application.

[18] Calculation wise the plaintiff's stay application was filed
E approximately one year two months and six days after the filing of the D4 suit, the S4 suit and the S6 suit. And the plaintiff's stay application was also filed approximately 1 year 20 days after the filing of the defence to the D4 suit and the filing of the defence and counterclaim to the S6 suit and approximately one year 13 days after the filing of the defence and counterclaim to the S4 suit.

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[19] That would constitute an inordinate and contumelious delay. That delay was certainly fatal (*Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297). In seeking the court's discretion in granting the stay, the plaintiff should have filed
G encl. 35 promptly and should not sleep on its rights (*Haji Wan Habib Syed Mohamed v. Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 CLJ 115; [1986] CLJ (Rep) 149 SC). No explanation was forthcoming to this day for the delay in filing encl. 35. One can only conclude that the stay application was filed *mala fide* and was simply a tactical ploy bearing in mind that:

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(a) there were striking out applications for the S6 suit and the S4 suit and these applications are still pending disposal; and it was simply

(b) to counter the order dated 11 December 2006 which transferred the
I S4 suit to the S6 court and that the S4 suit would be heard after the hearing and disposal of the S6 suit.

[20] What the plaintiff is saying is this - stay the present proceedings and let us litigate the D4 suit. That cannot be the right approach. It smacks of *mala fide* and *mala fide* is not a ground to stay the present proceedings. There is no harm if the present proceedings were to proceed abreast with the D4 suit. Balancing all the factors, the plaintiff has not made out a case for a stay (*New Zealand Society Of Physiotherapists v. Accident Compensation Corporation* [1988] 1 NZLR 157). The present proceedings should not grind to a halt. Public policy demands that all cases are to be expeditiously completed. Section 108 of the Interpretation Acts 1948 and 1967 (Act 388) enacts as follows:

> Provision when no time prescribed.
>
> 108. Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises.

Public interest policy is clearly manifested in this section and I must give effect to it accordingly.

Conclusion

[21] For the reasons as adumbrated above, I dismissed forthwith the stay application without costs. I then made an order that the case management of this case be fixed on 16 August 2007, well after the hearing of the D4 suit.